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IN THE

Supreme Court of the United States

No. 440. October Term, 1928.

The United States, *Petitioner*,

vs.

The Galveston, Harrisburg & San Antonio Railway Company, *Respondent*.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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I.

Question Presented by Petition Settled by Prior Decisions of This Court and Court of Claims.

The question whether the Government is entitled to land-grant deductions on the transportation of the authorized private mounts of Army officers changing station should be regarded as settled by the decisions of this court and of the Court of Claims.

In substance it is the same question as that passed upon by this court in *Oregon-Washington Railroad & Navigation Company v. United States*, 255 U. S. 339 (affirming 54 C. Cls. 131), which involved the right of the Government to land-grant deductions upon the transportation on Government bills of lading at public expense of the household goods and other personal effects of Army officers within their change of station allowance.

In that case the Court of Claims (speaking by Judge Downey, formerly Comptroller of the Treasury) said that "the question as to the applicability of land-grant rates to this class of transportation may be regarded as settled adversely [to the Government] by the *Chicago, Milwaukee & St. Paul Ry. Co. Case* [50 C. Cls. 412] decided by this court February 8, 1915."

Upon appeal this court referred to said decision of the Court of Claims as follows (255 U. S., at pp. 344-5, italics ours):

> "The decision referred to is *Chicago, Milwaukee & St. Paul Ry. Co. v. United States*, 50 Ct. Clms. 412, and the ground of its ruling was that the freight transported was not the property of the United States, it being the effects of Army officers, and, therefore, was not entitled to land-grant deductions but was subject to the commercial tariff. Necessarily, therefore, the pending case must turn on other questions, for the property transported was the property of Army officers and subject, therefore, independently of other considerations, to the commercial rates. Appellant in the present case was paid sums less than those rates and there is left for consideration only its present right to recover the difference between

them and the land-grant rates, the latter being those that were paid.

"The Government, however, is not inclined to that limitation of the issue, and attacks the ruling of which it is the consequence, and repeats the contention decided against it in that case, and again insists that the property transported was government property and entitled to land-grant rates and all else is irrelevant. To this appellant replies that the Government did not appeal from the decision and must be considered as having accepted it. The effect is rather large to attribute to mere non-action, but we need not make further comment upon it because we think the decision of the Court of Claims was correct. *The personal baggage of an officer is not property of the United States and as such entitled to transportation at land-grant rates,* and we are brought to the grounds of recovery urged by appellant."

In a later case of the *Oregon-Washington Railroad & Navigation Company* (58 C. Cls. 645), which involved the transportation of *private mounts* as well as household goods, personal effects, etc., of Army officers changing station within their authorized allowance, Judge Downey, again delivering the opinion of the court, said (58 C. Cls. at p. 648, italics ours):

> "The property involved was in all instances the property of the individual and not of the United States, *and it is now to be regarded as settled that such property is not in any sense to be regarded as property of the United States for transportation purposes within the provisions of the land-grant acts.*"

The contention that Army officers' authorized private mounts were *quasi* public property and the Government entitled to their transportation at land-grant rates, was therefore overruled.

In that case the Court of Claims distinguished two prior cases in which it had been held that the carrier could not recover because it did not appear that the transportation of the Army officers' private mounts involved had been authorized by law. (*Illinois Central R. R. Co. v. U. S.*, 52 C. Cls. 52, and *Atchison, Topeka & Santa Fe R. R. Co.*, 55 C. Cls. 339.) But as to the case then before it the court said (58 C. Cls. at p. 650, italics ours):

> "Since the Government had lawfully undertaken to furnish the transportation *and the property transported was not property of the United States*, there was obligation to pay without right to land-grant deduction, and we have therefore directed judgment for the plaintiff * * *."

In the present case counsel for the Government, in the Court of Claims, recognized that the question as to the right of the Government to land-grant deductions on the transportation of Army officers' household goods, personal effects, etc., had been settled by the Court of Claims and this court adversely to the Government. They endeavored, however, to distinguish this case on the ground that the Government has a peculiar interest in an Army officer's authorized private mounts, owing to the fact that it makes him an allowance towards their purchase and also requires them to be used in the public service. But an Army officer's household goods and other personal effects (among which are included his professional books and uniforms) are also used by him in or in connection with the performance of his military duties, and he may receive an allowance from the Government for their purchase.

As to the personal effects and private mounts of an Army officer, Judge Downey, in his opinion in the

Oregon-Washington Railroad & Navigation Company Case, reported in 58 C. Cls. said (at pp. 648-9):

> "Regulations of the War Department have for many years provided for the transportation at Government expense of an Army officer's personal effects on change of station, the amount in pounds being related to the rank of the officer, and likewise regulations have provided for the transportation on change of station of a mounted officer's authorized mounts, the number for which, according to rank, the Government furnishes forage.
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> "Assuming it to be determined that such property is not entitled to transportation at land-grant rates as Government property, the remaining contention is that, although its transportation at Government expense is authorized by regulation, there is no authority of law for the regulations, and that regulations without authority of law can not impose an obligation on the Government. Summarizing, the defendant says that the court is asked to decide that privately owned household goods are the property of the United States for the purpose of fixing Government liability and privately owned by Army officers for the purpose of fixing the amount of the liability.
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> "This latter contention has an element of fallacy in it. Primarily it may be said that the liability of the Government for the transportation of property is limited to the transportation of its own property, but it does not follow that it may not obligate itself for the transportation of other property. And in the service of an Army officer is found abundant reason for doing so.
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> "An Army officer has no fixed station such as is usually the case with civilians. He is subject to orders and must move when directed. Family ties appeal to him as to other men, the maintenance of a home means household goods, and when

> the needs of the service demand his transfer to another station it is but natural to say that, if he be not assigned to furnished quarters, his goods must go with him to his new station. His mounts, such as he must needs use in the performance of his duties, must also accompany him, and all the circumstances but tend to furnish reasons why the Government should in these cases assume an obligation as to the transportation of property not its own."

That the United States must have absolute title to the property transported in order to entitle it to land-grant deductions, and that a less interest therein is insufficient, although the property be transported by the carrier upon Government bills of lading at public expense and for a governmental purpose, was recognized by this court in *Illinois Central Railroad Co. v. United States*, 265 U. S. 209, affirming 57 C. Cls. 277, which involved the transportation of coal, stone and other articles for use in Government improvement of the Missouri River, and in which case the question of the title of the United States to the property transported was the only issue.

II.

The Restrictions in the Army Appropriation Acts upon the Payment of Land-Grant Railroads for Government Transportation Apply Only to the Transportation of Troops and Property of the United States.

It is also well settled that the provisions of the Army Appropriation Acts relating to Army transportation over land-grant railroads, are alike in their restrictions as to payment for Government transportation, in that they apply only to the transportation of troops

and property of the United States, and provide for the payment of each of the two classes of fifty per cent land-grant railroads on the same basis.

Thus the Comptroller of the Treasury, in a decision rendered January 22, 1919 (25 Comp. Dec. 520, 523), referring to the restrictions in the Army Appropriation Acts, said (italics ours) with respect to the two classes of fifty per cent land-grant railroads:

> "It appears to have been the practice, without any definite determination by the Secretary of War of what rate should be deemed just and reasonable, to adopt the authorized maximum of 50 per cent of tariff rates as the basis of settlement for the transportation of *property and troops of the United States* over said railroads.
>
> "It appears to have been the purpose of Congress, *though with slightly different form of language*, to authorize the payment of transportation of property and troops for the United States over *both* these classes of land-grant railroads *on the same basis*, unless otherwise determined by the Secretary of War, as provided for the second class of roads."

In other words, the long-continued administrative interpretation of said restrictive provisions of the Army Appropriation Acts is that they apply only to the transportation of property and troops of the United States by the two classes of fifty per cent land-grant railroads. Hence, the Comptroller of the Treasury and his successor the Comptroller General have resorted to the legal fiction of classifying certain property not owned by the United States, but transported at its expense, such as Army officers' private mounts and personal effects, as "*quasi* public property," in an effort to bring such property within the terms of the land-

grant privilege. As above shown, however, both this court and the Court of Claims have ruled otherwise.

III.

Attempt of the Comptroller of the Treasury to Avoid the Effect of the Decisions of the Courts as to What are Troops and Property of the United States Within the Meaning of the Railroad Land-Grant Acts Disapproved by Congress.

After the decision of the Court of Claims in the case of the *Chicago, Milwaukee & St. Paul Ry. Co.* (50 C. Cls. 412), above cited, holding that the Government was not entitled to land-grant deductions on Army Officers' personal effects, the Comptroller of the Treasury nevertheless refused to allow full commercial rates for such transportation on the ground that he was precluded from so doing by the above mentioned provisions of the Army Appropriation Acts restricting payment for Army transportation over land-grant railroads (22 Comp. Dec. 263, opinion dated December 14, 1915). Thereupon the matter was called to the attention of Congress, which inserted in the Army Appropriation Act approved August 29, 1916 (39 Stat. 619, 634), immediately after said restrictive provisions, the following additional proviso:

> "*And provided further*, That nothing in the preceding provisos shall be construed to prevent the accounting officers of the Government from making full payment to land-grant railroads for transportation of property or persons where the courts of the United States have held that such property or persons do not come within the scope of the deductions provided for in the land-grant Acts."

Congress thus disavowed the narrow construction placed by the Comptroller of the Treasury upon said restrictive provisions of the Army Appropriation Acts, and indicated its wish that the accounting officers of the Government, in making payment for Army transportation over land-grant railroads, should follow the decisions of the courts of the United States as to what constitutes troops and property of the United States within the meaning of the railroad land-grant Acts.

In the present case, the Comptroller General, while forced to yield to the decision of this court in the *Oregon-Washington Railroad & Navigation Company Case* (255 U. S. 339; affirming 54 C. Cls. 131) as to the *non* land-grant status of Army officers' household goods, personal effects, etc., transported by the carriers upon Government bills of lading at public expense, still insists on the correctness of his view with respect to the land-grant status of Army officers' private mounts under similar circumstances, and has prevailed upon the Department of Justice to seek a review of the matter by this court, notwithstanding said Department, in 1923, declined to take an appeal to this court from the judgment of the Court of Claims in the *Oregon-Washington Railroad & Navigation Co. Case*, 58 C. Cls. 645, above referred to, which involved the same question.

IV.

Land-Grant Privilege Not to be Extended by Construction.

The privilege of free or reduced rates for the transportation of "troops and property of the United States" secured to the Government in the railroad land-grant Acts is not to be extended by construction

to persons or property not actually troops or property of the United States. Manifestly such provisions differ materially from the provisions of such acts making grants of land to the railroads concerned. In the latter case, Congress has conferred a benefit upon the grantee, while in the former Congress is exacting something of value from the railroads. So, the Court of Claims, in the *Alabama Great Southern Railroad Company Case* (49 C. Cls. 522), held that the term "troops of the United States" as used in those Acts was not to be construed to extend to the transportation, at the expense of the United States, of State militia, since they were merely "potential" troops of the United States, and this court, in the *Union Pacific Railroad Co. Case* (249 U. S. 354), held that said term should not be construed to apply to "applicants for enlistment in the Army," since they were not actual soldiers.

In the Union Pacific Railroad Co. case just cited this court, speaking by Mr. Justice Brandeis, while recognizing the distinction drawn in the land-grant Acts between freight and property, also recognized that the term "property" as used therein had reference only to property of the United States, for he said (249 U. S. at pp. 356-7, italics ours):

> "* * * All 'property' *of the Government*, whatever its character and intended use, is to be carried 'free of toll or other charge;' but of the many persons in its service, only 'troops.'"

The cases cited settled the principle—equally applicable here—that the person or thing transported must come squarely within the terms of the privilege secured to the United States by the land-grant Acts, and be absolutely and unqualifiedly "troops or property of

the United States" and not merely possible, potential, or *quasi* troops or property of the United States; the fact that the United States may have an interest in such persons or property, or bear the expense of the transportation thereof, being held insufficient to entitle it to said privilege.

Undoubtedly the grants of public land made to the railroads by the United States in the land-grant Acts were of great value. But there were adequate considerations for these grants independently of the privilege of free or reduced rates exacted of the railroads in some of those Acts for the transportation of troops and property of the United States. Said grants were made because it was to the interest of the United States to have the transcontinental and other railroads built as promptly as possible, and when such enterprises were very hazardous and extremely expensive. The provision as to the transportation of troops and property of the United States at free or reduced rates, made in certain of those Acts, was a mere incident, and those responsible for its insertion doubtless never conceived that its value to the United States—and its corresponding expense to the railroads—would grow to the proportions it has now assumed. Consider how enormous this burden would be upon the railroads—and it applies to practically all the railroads, land-grant as well as non land-grant, because of the equalization agreements made with them by the Government—if the words "troops and property of the United States" are to be extended by construction to embrace every kind of military organization and every kind of property in which the United States has some interest or as to which it bears the expense of railroad transportation! This is the contention, however, which the Comptroller General—in the interest of governmental